UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CANTON-POTSDAM HOSPITAL

and **Case No. 03-CA-114181**

1199 SEIU UNITED HEALTHCARE WORKERS EAST

John Grunert and Greg Lehmann, Esqs.,
for the General Counsel.
Ronald J. Andrykovitch, Esq. (Cohen & Grigsby, P.C.)
Pittsburgh, PA., for the Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge, a first amended charge, and a second amended charge filed by 1199 SEIU United Healthcare Workers East (Union) on September 26, 30, and October 22, 2013, respectively, a complaint was issued against Canton-Potsdam Hospital (Respondent, Employer or Hospital), on November 26, 2013.

The complaint alleges that since about September, 2013, the Respondent has unlawfully maintained a rule prohibiting employees from wearing certain union insignia. The Respondent's answers denied the material allegations of the complaint. An affirmative defense, and a Motion to Dismiss asserted that the matter must be deferred to arbitration.[1]

On January 27, 28, and February 4, 2014, a hearing was held before me in Albany, New York. Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization Status

The Respondent, a not-for-profit corporation having its office and place of business at 50 Leroy Street, Potsdam, New York, has been engaged in the operation of an acute care hospital. During the past twelve months, the Respondent, in the conduct of its business operations, has derived gross revenues in excess of $250,000 and purchased and received at its Potsdam, NY location goods and materials valued in excess of $5,000 directly from points located outside New York State. The Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

[1] Counsel for the General Counsel filed an Opposition to the Motion and I reserved ruling thereon until this Decision.

The Respondent also admits, and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Facts

A. Background

The Respondent, a 94 bed acute care facility located in a rural part of upstate New York, employs about 985 employees. There are about 430 service, maintenance, clerical and LPN Technical employees in bargaining units represented by the Union. The Union has a current collective-bargaining agreement with the Employer, and has represented the Hospital's employees for at least nine years.

The collective-bargaining agreements were scheduled to expire on September 30, 2012. [2] Prior to their expiration, the parties negotiated toward a successor agreement. During negotiations, the Employer proposed new health insurance plans in which employees would have to pay a portion of their health care cost. Under the expiring contract, the employees did not contribute toward their health insurance for individual coverage, and the Union opposed the Employer's proposal.

B. The "Health Insurance" Stickers

In response to the Employer's proposal that employees contribute to their health insurance premiums, Mary Wilsie, the Union's administrative organizer, created a sticker for union members to wear. The two inch by four inch rectangular sticker bears an outline of two hands and the message "Hands Off Our Health Insurance."

At about the same time, Wilsie distributed purple bracelets with the Union insignia and purple ribbons without an insignia. Purple is the Union's dedicated color. Employees began wearing them immediately.

On September 24, Wilsie gave the stickers to the Union's delegates and bargaining committee members who distributed them to their co-workers. Employees began wearing them immediately. Wilsie instructed that the stickers be worn on the days when negotiations were held. A negotiation session was scheduled for the following day.

Gloria Shea, a salad maker in the dietary (nutritional service) department wore the sticker at work on September 24. She testified that her supervisor, Steven Gadapee, approached her in the kitchen and said "I don't know what the stickers are all about, Gloria, but I want you to know that I've called the human resources department and I'm waiting to hear back about them." Shortly thereafter, Gadapee told her "I don't have a problem with you wearing it, but anyone who had direct patient care is not allowed to wear them. That's what I was told."

Housekeeper Tina Clark also wore the "Hands Off" sticker on September 24. As she was leaving work that day, admitted supervisors Benjamin Gratto and Nicholas Pomainville, spoke to her in the housekeeping hallway, which is not a patient care area. Clark testified that they told her to remove the sticker. Clark refused, and went home.

[2] The contract has been extended to February 28, 2014.

The following day, September 25, housekeeping employees reported to a "huddle" meeting at 7 a.m. Such meetings are held each morning for a few minutes during which the supervisors advise the workers as to any changes in their assignments or any complaints that were received.

Clark testified that during the meeting Gratto told the 10 workers that "[you] are not allowed to wear the stickers in patient areas" adding that "patient areas" are the "whole hospital." She quoted Gratto as saying that his "bosses told us that we are not allowed to wear those stickers in patient areas." Another supervisor, Sean Clough, told them to "take it off, altogether." Housekeeper Darlene Emlaw gave similar testimony, stating that Gratto told the workers that they were not allowed to wear the "Hands Off" stickers until further notice.

Carla Snell, the Respondent's employee relations manager, stated that she was advised by certain Hospital managers that they saw employees wearing the "Hands Off" sticker and asked if they could permissibly be worn. Snell conferred with Dr. Darlene Lewis, the vice president of human resources, and with the Hospital's attorney, John Lycheski, and reviewed the collective-bargaining contract. On September 25 at 10:43 a.m. Snell sent an email to the Employer's leadership team as follows:

> As the 1199 negotiations continue you will undoubtedly see employees wearing stickers in opposition to the Hospital's position on health insurance. These stickers should not be worn in those immediate patient care areas where patients and their families are present in the normal course of care and treatment.
>
> If you notice an employee wearing this sticker in the patient care areas mentioned above please advise the employee of the Hospital's position and request the employee to remove the sticker.

Nurse manager Holly Cole testified that immediately after she received the email from Snell she observed a clerk in her unit wearing the "Hands Off" sticker at her seat at the nurses' station which Cole considered a patient care area. She asked the clerk to remove the sticker and she did.

Gratto contradicted Clark's testimony about the meeting that day. He stated that it took place at about 3 p.m., after he received Snell's email. He did not have that email in hand when he told the assembled workers that "the stickers they were wearing couldn't be worn in patient care areas." He stated that he referred specifically to the "Hands Off" and "I Support EJ Noble Workers" stickers. He had seen employees wearing both stickers prior to the meeting. The workers asked why they could not wear those stickers and Gratto replied that they were "inflammatory." He told them that "if they had them on their uniform, they had to remove them." He did not tell them that they could wear the stickers in non patient care areas.[3]

Gratto further testified that he referred to the EJ Noble sticker because between the time he received Snell's email and the meeting that afternoon, Pomainville told him that those were the stickers at issue. He noted that he had seen employees wearing the "EJ Noble" sticker before the meeting. Employee Emlaw asked whether they could wear the purple wrist bands and ribbons. He replied that he would find out.

[3] In this regard, two employees in Gratto's department work exclusively in waste removal jobs, spending about 30% of their time in non patient care areas.

Apparently, Shea and Clark told Union agent Wilsie of their supervisors' instructions to remove the stickers. Wilsie told Employer attorney John Lycheski at a bargaining session later that day that Shea and Clark were instructed to remove their stickers. Wilsie said that it was the members' right to wear stickers. Lycheski responded that "at the time they did not want anything worn. They didn't want the stickers worn in the facility." Wilsie also quoted Lycheski as saying that he "did not want to get the patients involved in what was going on and that was the reason for the restriction."

Lycheski left the bargaining table and returned shortly thereafter and said that the Employer "would agree to allow the stickers to be worn as long as they are worn in non patient care areas." Wilsie asked him to clarify what he meant by that term, and he said that a "patient care area … is an area on the medical floor where a patient was in a bed, was incapacitated and in a bed on the medical floor." Wilsie's pre-trial affidavit stated that Lycheski said that a patient care area was anywhere where the employees were taking care of patients or words to that effect."Lycheski did not testify at the hearing. Wilsie responded that union members have a right to wear the stickers and would wear them, and if they were not permitted to do so, the Union would file a charge.

At the end of the meeting, it was agreed that employees would be permitted to wear the stickers in non patient care areas. It was also agreed that employees could continue to wear the purple bracelets and purple ribbons that they had been wearing. The Employer agreed to send an email outlining the parties' agreement.

The following day, September 26, Carla Snell sent the following email to her leadership team and to Wilsie:[4]

> To follow up regarding my email yesterday regarding 1199 members wearing stickers. You may see employees wearing purple wrist bands or purple ribbons, we have no opposition to employees wearing these, we are only addressing the stickers that have offensive or inflammatory messages, such as the ones being worn now addressing opposition to the Hospital's position on health insurance. Again we are requesting that stickers only not be worn in those immediate patient care areas where patients and their families are present in the normal course of care and treatment.

Snell testified that her emails of September 25 and 26 related only to the "Hands Off" sticker.

C. The "EJ Noble" Stickers

On October 14, employees began wearing a sticker that said "I Support EJ Noble Workers."Carla Snell testified that certain managers asked her whether the stickers could be worn since they had nothing to do with the current contract negotiations. The sticker is round and 2½" in diameter.

EJ Noble is a hospital located about 10 miles from the Employer. Certain bargaining

[4] The Employer did not send the email to its employees.

units there are represented by the Union. The Respondent bought the assets of EJ Noble and opened a new hospital on January 14, 2014, renaming it Gouverneur Hospital. Apparently there was some dispute concerning the employees at the former EJ Noble hospital. Wilsie testified that she sought to have the Respondent's employees show support for the EJ Noble workers by wearing that sticker.

Snell conferred with Lewis and Lycheski and determined that the sticker could not be worn because it "did not deal with the current issues [being negotiated] with the Union and because there had been so much publicity in the papers about what was going on at the time and the fact that we felt that it could be very controversial. And these prompting, perhaps, discussion that would take away from the care of the patients at the hospital."

Snell explained that the impact of the newspaper articles concerning the Respondent's agreement with EJ Noble was great because one or two local newspapers reported on the matter to the small rural area which encompassed the Hospital, and that one article quoted Kathy Tucker, the International Union's representative, as saying something to the effect that the Respondent was attempting to "bust" the union at EJ Noble.[5]

On October 15, Snell sent an email to her leadership team which stated:

> Yesterday, Mary Wilsie from 1199 SEIU distributed stickers to CPH employees that read "I Support EJ Noble Workers." We are taking the same position on these stickers as we did with the previous stickers that read "Hands Off Our Health Insurance." We have opposition to employees wearing these stickers in immediate patient care areas where patients and their families are present in the normal course of care and treatment. Our position is that this message creates the perception of divisiveness and invites a negative response from patients and/or family members.
>
> If you see employees wearing the stickers with either "I Support EJ Noble Workers" or "Hands Off Our Health Insurance" in patient care areas, please advise them to remove the sticker and that they should only be worn in areas where patients and families are not present.
>
> Also as a reminder, purple ribbons and purple wristbands are acceptable to wear, this only applies to the stickers mentioned above.

Supervisor Gratto testified that in mid January, he saw employees Tina Clark and Diane Vincent wear the "EJ Noble" sticker at a huddle meeting in the service hallway, which he conceded is not a patient care area. He asked them to remove the stickers because they were

[5] The article entitled "Feedback: EJ Noble Hospital Union-Busting," states that "a leader of a union representing many employees at EJ Noble Hospital says the reorganization of the hospital into Gouverneur Hospital will, in effect, break the union. That's despite assurances … that the reorganization is not an attempt at union-busting. 'We've already been told that there will be no contract and, essentially there will be no union,' said Kathy Tucker." The article also quoted Tucker as saying that "we're not going to just sit back and take it, I guarantee that. We hope that the community comes out and joins us in support of the workers."

about to enter a patient care area after the meeting. Clark was unable to remove the sticker because it was stuck to another sticker on the reverse side. He had her cover the sticker with yellow paper and tape. Vincent removed her sticker.

D. The January 17 Email

On January 17, 2014, Carla Snell sent the following email to her leadership team:

> Recently it has been brought to my attention that employees are adhering 1199 stickers to either the backside of their name badge or the red emergency cards. Our position is that these name badges and emergency cards should not be covered with any type of stickers, pins, etc. unless specifically authorized by HR, as is the case with the round Flu sticker. If employees are adhering stickers to their badges please advise them they must be removed.
>
> Our position remains unchanged from my previous memo on October 15, 2013:
> [The email then repeats the email dated October 15, above]

Peter Snell, the director of nutritional services at the Employer and an admitted supervisor, upon receiving the above email, copied and pasted the first paragraph of the January 17 email, above, and added the following, which essentially repeats Carla Snell's email of October 15.

> Canton Potsdam Hospital is taking a position on employees that are wearing stickers that read "I Support EJ Noble Workers" and "Hands Off Our Health Insurance." We have opposition to employees wearing these stickers in immediate patient care areas where patients and their families are present in the normal course of care and treatment. Our position is that this message creates the perception of divisiveness and invites a negative response from patients and/or family members.
>
> Also as a reminder, purple ribbons and purple wristbands are acceptable to wear, this only applies to the stickers mentioned above.

However, Peter Snell added the following paragraph to his email:

> Every NS [Nutritional Service] employee will be in an area where patients and families are, so the 2 stickers outlined in this message are not allowed to be worn at any time while you are working.

He posted this memo on the kitchen employees' bulletin board on January 17, the same day he received Carla's email. Peter prepared the memo on his own, and testified that he sincerely believed that every area of the hospital is a patient care area. He testified that at the huddle meeting the following week he told the workers that there was information about the two stickers that were in question, asked the employees to read his memo, and said "if you have these two stickers on your person at any point please remove them."

On about January 30, when Carla Snell learned of Peter's notice, she informed him that his understanding of the term "patient care area" contradicted that of the Hospital. She directed him to change his memo to delete the newly added paragraph. He did so and posted the new memo that day. He met with his employees and informed them that the memo had been amended. Peter was not disciplined for preparing and posting the January 17 memo.

Carla Snell testified that employees have not been wearing the "Hands Off" or "EJ Noble" stickers in patient care areas following their being advised, on October 15, that they were not permitted to do so. However, Gratto testified that since the email from Carla Snell, he has seen employees occasionally wearing the "EJ Noble" sticker, adding that if he saw a worker wearing it, he would ask her to remove it.

Regarding the placement of the stickers on the back of the employee's identification card or emergency card, Debra Marques-Seaman, the director of the third floor med-surg unit, testified that the employee's name and photograph should not be obscured by any other material because patients and visitors should be able to identify the employee, and such a practice is unprofessional. Further, covering the red emergency card may lead to the employee not being able to determine whether and how to respond to an emergency.

Employee Emlaw attached an "EJ Noble" sticker and the "Purple Strong" stickers to the back of her name badge when she received them. She wore them during her work in patient care areas and non-patient care areas. In mid-October, supervisor Pomainville asked her to remove them and she did. Emlaw testified that, at that time, she was not informed that she could not place the stickers on her badge.[6]

E. The Practice of Wearing Insignia

Union agent Wilsie stated that during contract negotiations for the current agreement, in 2010 or 2011, employees wore a 2" x 2" sticker bearing the image of two hands which stated "Hands Off My Benefits." Wilsie testified that she saw employees wearing that sticker in all areas of the hospital, including patient care areas, and that the Hospital did not object to employees wearing that sticker. Housekeeping employee Tina Clark testified that she wore that sticker in patient care areas and non patient care areas of the hospital. She was not told to remove it by any Employer representative. Emlaw identified the image as a button and not a sticker and she, too, wore it in all areas of the hospital.

After September 26, the Union produced and distributed to employees various stickers in addition to the two stickers at issue here. They included "United for A Fair Contract", "Happy New Year", "Our Skin Your Game", "Purple Strong", and "I Don't Want to be Screwged!"[7] Union agent Wilsie testified that the stickers were produced to correspond with events occurring during contract negotiations, and to promote cohesiveness and solidarity among the unit employees.

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[6] I reject the General Counsel's argument that the request that Emlaw remove the stickers violated the Act. The stickers were attached to her name badge. The Respondent had a legitimate interest that the badge should not be covered by any material. Although Emlaw testified that she was not told that she could not adhere the stickers to her badge, the Respondent's rule, set forth above, properly prohibits such a practice.

[7] Each of the stickers except the last is round and 2½" in diameter. The last sticker is 2" x 4" and bears an image of the character Ebenezer Scrooge, the miser portrayed in Charles Dickens' novel, *A Christmas Carol*.

Typically, employees began wearing stickers distributed by the Union on their uniforms but found that after a day's wear the adhesive lost its grip and fell off the garment. They then laminated the stickers to each other and attached them to a lanyard which also had their hospital identification card and red emergency card. The stickers hung separately from the Hospital cards on the lanyard.

Supervisor Pomainville testified that he saw a group of about 24 employees including catering associates who bring food to the patients, wearing stickers in patient care areas and non patient care areas.

Catering associate Sandra Mallory stated that she wore the two stickers at issue in patient care areas and non patient care areas, and saw other employees wearing the two stickers at issue and all the stickers, above, in all areas of the hospital in patient care and non patient care areas.

Housekeeping employee Tina Clark gave similar testimony, stating that when she cleaned patient rooms she wore all the stickers set forth above, from October, 2013 to the time of the hearing. She also testified that she saw employee Cindy in the Cardiac Care Unit and Melissa, the third floor ward clerk who sits behind the nurses' station, wearing the "Unite for a Fair Contract", "Happy New Year", "Our Skin Your Game", and "Purple Strong" stickers.

Housekeeping employee Emlaw gave similar testimony, further stating that nursing supervisor Debra Seaman saw her wearing union stickers. Seaman testified that she has seen her ward clerk wearing the Purple Strong sticker and a purple bracelet.

In addition to Union related stickers, employees wore personal pins including holiday pins, cancer awareness pins, and years of service pins issued by the Employer. Clark testified that she wore such pins in patient care and non patient care areas and was not told to remove them. Employee Shea stated that she did not see a supervisor advise employees to remove those pins.

Carla Snell testified that after September, 2013 she has occasionally seen employees wear the "Purple Strong" and "Scrooged" sticker, and a purple ribbon in non patient care areas. However, prior to September, 2013, she has not seen employees wear union related or non-union related stickers. She stated that she saw employees wear holiday pins, and has seen them wear breast cancer awareness pins in patient care areas and non patient care areas.

Snell further testified that the Respondent does not object to employees wearing personal or holiday pins, the purple ribbon and bracelet, 1199 pins, or any of the following Union stickers in patient care areas or non patient care areas: "United for a Fair Contract", "Happy New Year", "Our Skin Your Game", "Purple Strong" and "I Don't' Want to be Scrooged." The Hospital's only objection relates to the two stickers at issue here, "Hands Off Our Health Insurance" and "I Support EJ Noble Workers."

F. **Lack of Patient Complaints Concerning the Stickers**

The General Counsel subpoenaed all documents from September 13, 2013 to the present relating to any disturbance or disruption of health care operations caused by employees wearing stickers. The Respondent answered that no such documents exist. In addition, Wilsie testified that she asked Employer counsel Ronald Andrykovitch and human resources vice president Lewis whether there were any patient complaints about the stickers, and they said

there were none.

G. The Reason for Prohibiting the Wearing of the Two Stickers

Carla Snell testified that in deciding whether employees could wear the two stickers at issue, she consulted the collective-bargaining agreement, using it as a "reference or resource."

Snell relied on the management rights clause which states that the Employer has an exclusive right to "promulgate reasonable rules and regulations not in conflict with this Agreement as it may from time to time deem best for the purpose of maintaining order, safety and/or effective operation of the Hospital…."

Snell also relied on Article 33 – No Strike No Lockout, which states, in part, that "no employee shall engage in … any interference with the operations of the Hospital."

Snell conceded that the Hospital had no rules prohibiting the wearing of union insignia, or non-employer insignia. She further stated that prior to September, 2013, there was no rule, other than the dress code policy, regarding the wearing of insignia. That policy states that "professional association pins and other hospital distributed buttons, slogans, emblems, etc. are appropriate to wear at the hospital."

She investigated the question, whether in the past, the Hospital prohibited stickers or buttons deemed to be "controversial and disruptive to patient care" and discovered a memo issued in October, 2008. That memo advised all employees that "with election season upon us, this is a reminder that … the Hospital does not allow political advertising to be displayed in the Hospital. This restriction includes posters, campaign buttons, flyers, or any other promotion of political candidates. Collateral pieces urging citizens to vote are allowed, as long as no candidate is promoted."

Analysis and Discussion

I. Deferral to the Grievance-Arbitration Process

The Board has consistently held that while a deferral defense and the merits of the matter may be addressed in the same hearing and the same decision, "[w]hether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered." *Sheet Metal Workers Intl. Assn Local 18 (Everbrite)*, 359 NLRB No. 121, slip op. at 2 (2013), citing *L.E. Myers Co.,* 270 NLRB 1010, 1010, fn. 2 (1984).

The Respondent moved to dismiss the complaint arguing that the instant matter must be deferred to the grievance process set forth in its collective-bargaining contract. It repeated that argument in its post-hearing brief.

The contract's grievance-arbitration provision broadly defines a grievance as a "dispute or complaint … concerning the interpretation, application, or any alleged breach of a specific provision of this Agreement." The first step of the grievance procedure must be invoked within five days from the time the grievance occurred. However, according to the contract, that time limit may be mutually extended by the parties. The Respondent has agreed to waive any time limitations in the grievance-arbitration provisions.

The question before me is whether the Respondent properly prohibited the two stickers

under those provisions of the contract permitting management to promulgate a rule for the purpose of maintaining order, safety and/or effective operation of the Hospital and its rule prohibiting interference with the operations of the Hospital, as set forth above.

The Employer thus generally argues that its actions in forbidding the wearing of the two stickers in patient care areas is a contractual issue which must be deferred to the grievance-arbitration provisions of the parties' agreement. It states that the dispute centers around the interpretation and application of the contractual provisions to the actions it took in prohibiting the wearing of the two stickers in patient care areas.

It specifically argues that the question whether the Union waived its statutory right to strike in Article 33 [the No Strike No Lockout clause prohibiting interference with the Hospital's operations] must be deferred to arbitration.

The Employer argues that since the issue involved herein arises from the contractual terms of the parties' agreement, their preferred method of resolving disputes, the grievance-arbitration process, must be utilized.

The General Counsel argues that the matter may not be deferred to arbitration because no contractual provision addresses the wearing of union insignia or Section 7 rights. The General Counsel also states that deferral is inappropriate because the arbitrator would not reach the issue of the employees' protected activity. He cites *Stevens Graphics, Inc.,* 337 NLRB 457 (2003), where the Board held that deferral was inappropriate where the violation consisted of the employer's restriction of postings on a bulletin board and the parties' contract did not address that issue. The Board stated that "there is no assurance that the alleged Section 7 rights of the employees are covered in the contract." 337 NLRB at 460. See *Chapin Hill at Red Bank*, 359 NLRB No. 125, slip op. at fn. 5 (2013).

The Employer, on the other hand, argues that in *United Technologies Corp.*, 274 NLRB 504 (1985), the Board deferred to arbitration the issue of the employer's supervisors instructing employees to remove buttons they wore in protest of a shop steward's suspension. The Employer thus urges that deferral take place here because the issues are essentially the same. However, in that case, the Board held that deferral was appropriate because the issue was encompassed by the discrimination language of the parties' contract, and thus amenable to the applicable grievance mechanism. Here, the claim is that by wearing the stickers the employees interfered with the Hospital's operations.

It is well-settled that the Board has "considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act." *Wonder Bread*, 343 NLRB 55, 55 (2004).

Deferral is appropriate when the following factors are present: The dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration; and the dispute was eminently swell suited to resolution by arbitration. *United Technologies Corp.*, 268 NLRB 555, 558 (1984).

Here, the parties have had a long, and apparently productive collective-bargaining relationship; no discriminatory action was taken against employees for wearing the prohibited

stickers; the arbitration clause is broad; and the Employer is willing to waive the timeliness of the filing of a grievance.

In *U.S. Steel Corp*., 223 NLRB 1246, 1247 (1976), it was noted that under *Collyer Insulated Wire,* 192 NLRB 837 (1971), deferral of consideration by the Board is dependent on the express language of the contract. As in *U.S. Steel*, here there is no provision regarding the wearing of insignia.[8] The Board held that "the authority of the arbitrator is limited to those matters explicitly contained in the contract. … There is no authority invested in an arbitrator to hear or decide matters not covered in the contract."

I find that the contractual provisions relied on by the Respondent cannot be fairly and reasonably construed to relate to the stickers at issue here. The contract permits the Employer to make reasonable rules for the purpose of maintaining order, safety and/or effective operation of the Hospital. I do not believe that any reasonable construction of that provision would permit a finding that that rule could be applied to the wearing of the stickers at issue here. Similarly, the no-strike provision which prohibits any interference with the hospital's operations could not reasonably be applied to employees wearing these stickers.

In addition, the Employer urges that the Union waived its right to object to the prohibition of the two stickers because of its agreement to the management rights clause. I do not agree. "A union's waiver must be "clear and unmistakable." *United Technologies*, 274 NLRB at 507. I cannot find that the Union waived its right to protest the prohibition of the two stickers or that the dispute was clearly encompassed in the arbitration clause.

Based on the above, I find and conclude that it is not appropriate that this matter be deferred to the parties' grievance-arbitration provisions of their contract.

II. The Merits

The complaint alleges that since about September, 2013, the Respondent has unlawfully maintained a rule prohibiting employees from wearing certain union insignia.

The Board, in *Saint John's Health Center*, 357 NLRB No. 170, slip op at 1-2 (2011), summarized the law on the issue of wearing union insignia in healthcare facilities:

> It is well established that employees have a protected right to wear union insignia at work in the absence of "special circumstances." In healthcare facilities, however, restrictions on wearing insignia in immediate patient care areas are presumptively valid, while restrictions on insignia in other areas of a hospital are presumptively invalid.
> The Board, with court approval, has created a presumption that protects an employer from liability if the employer bans …. the wearing of insignia in immediate patient care areas. *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). The basis of the presumption is that such solicitations or insignia "might be unsettling to patients – particularly those who are seriously ill and thus need quiet and peace of mind." *St. John's Hospital*, 222

[8] The dress code policy permitting the wearing of professional association pins is not a contractual provision.

> NLRB 1150, 1150 (1972). Although this presumption protects a healthcare facility's ban on all nonofficial insignia in immediate patient care areas, it does not protect a selective ban on only certain union insignia.
>
> In the latter type of case, the burden is on the hospital to show that the selective ban is "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). (Certain citations omitted)

As set forth above, Carla Snell's email instruction of September 25 prohibited the wearing of the "Hands Off Our Health Insurance" stickers in immediate patient care areas. Three weeks later, in mid October, Snell similarly prohibited the wearing of "I Support EJ Noble Workers" stickers in patient care areas.

The Employer's prohibition against wearing the two stickers in patient care areas enjoys a presumption of validity if all nonofficial insignia is banned from such areas. However, the presumption "does not protect a selective ban on only certain union insignia." *Saint John's Health Center*, above.

The evidence clearly establishes that other types of insignia including Union insignia have been routinely worn in patient care areas. Thus, the Respondent did not prohibit the wearing of any other insignia in all areas of the hospital including patient care areas. *Sacred Heart Medical Center,* 353 NLRB 147, 149 (2008); *Mt. Clemens General Hospital,* 335 NLRB 48, 50 (2001). Indeed, employee relations manager Snell conceded that the Respondent does not object to employees wearing other stickers such as "United for a Fair Contract", "Our Skin Your Game", "Purple Strong" and "I Don't Want to be Scrooged" in patient care areas. The Hospital further has no objection to employees wearing the Union's purple ribbon and bracelet or Union pins, or personal and holiday pins in patient care areas. The Respondent's only objection is to the wearing of the two stickers at issue here, "Hands Off Our Health Insurance" and "I Support EJ Noble Workers."

> Having allowed other types of insignia to be worn in immediate patient care areas, the Respondent may not now rely on the protection of the presumption of validity applicable to an across-the-board ban to justify its selective ban of only the specific union insignia at issue. Under the circumstances presented here, we find that the Respondent's ban on the Union's ribbon is not protected by the presumption of validity. *St. John's Health Center*, above, slip op. at 2.

The Respondent would, nevertheless, be justified in banning the two stickers from patient care areas if it can show that the selective ban is "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, above, at 507.

According to Carla Snell, the reason for the prohibition of the "Hands Off" sticker, as set forth in the September 26 email, was that the sticker was regarded as "offensive or inflammatory." The reason for the banning of the "EJ Noble" sticker was that the message "creates the perception of divisiveness and invites a negative response from patients and/or family members." Another reason was that the "EJ Noble" sticker had nothing to do with the current issues being negotiated with the Union and could be "very controversial" which would "take away from the care of the patients at the hospital."

The contractual provisions relied on by the Hospital which permit it to make rules to maintain order, safety and/or effective operation of the Hospital, and the No Strike No Lockout clause which prohibits actions interfering with the Hospital's operations do not expressly prohibit the wearing of the stickers in patient care areas.

In addition, the Hospital has not shown that the wearing of the stickers in patient care areas has resulted in any disturbance or disruption of health care operations. Nor have there been any patient complaints about the stickers. *Sacred Heart Medical Center*, above, at 149; *Mt. Clemens General Hospital*, above, at 50. Indeed, the sticker "I Don't Want to be Screwged" is arguably more offensive than the two stickers at issue here.

The Respondent further argues that its conduct in banning the two allegedly offensive stickers in patient care areas was permissible inasmuch as it prohibited only those stickers and permitted the wearing of other union stickers and insignia. The Board addressed this argument in *Holladay Park Hospital*, 262 NLRB 278, 279 (1982), in which it noted that it is "irrelevant that the respondent also permitted the employees to wear another union insignia which it deemed more 'professional.'" Here, the prohibition on wearing the two stickers was impermissible regardless of the number and types of other stickers and insignia not deemed objectionable by the Employer.

The Respondent also argues that it has not knowingly permitted the wearing of the two objectionable stickers in patient care areas. Rather, it has identified only those two as being controversial and disruptive to patient care, while at the same time, permitted those stickers which it did not deem to be objectionable. This "selective ban of certain union insignia" was deemed impermissible in *Beth Israel Hospital*, above.

Nor does the Hospital's dress code affect the result here. The code permits the wearing of professional and Hospital-distributed buttons but does not prohibit any other type of insignia. Indeed, other insignia, aside from the two stickers at issue, have not been prohibited by the Employer. Similarly, the Hospital's prohibition of political advertising cannot be construed as a precedent for a ban on union insignia.

Indeed, the Respondent's asserted reason for the ban, particularly of the "Hands Off Our Health Insurance" sticker is weakened by not objecting to its employees wearing a nearly identical "Hands Off My Benefits" sticker in patient care areas during the 2011/2012 negotiations. *St. John's Health Center*, above, at 2-3, and fn. 9.

Although there was no evidence that the Respondent expressly permitted the wearing of that sticker at that time, unlike the situation in *St. John's*, the evidence here establishes that the Respondent did not prohibit and did not object to the wearing of any insignia prior to its prohibition of the two stickers at issue here. I reject the Respondent's argument in its brief that the Hospital has been "consistent in its approach of banning only stickers of controversy in immediate patient care areas," and that therefore it has not engaged in a "selective ban" of union insignia. The evidence establishes that it has not prohibited or objected to the wearing of the nearly identical "Hands Off My Benefits" sticker in patient care areas.

The Respondent relies heavily on *USC University Hospital*, 358 NLRB No. 132, slip op. at 17-19 (2012). In that case, the employer banned the wearing in patient care areas of a sticker that said "Respect our "Work Stop Union Busting! We Support William Hooper NUHW." Hooper was a discharged shop steward. The reason for the prohibition was that its content was provocative, inflammatory and was designed to provoke controversy and cause dissension and a disruption of health care operations leading to the disturbance of the tranquil environment for

its patients. The hospital's past practice was that employees wore union insignia throughout the facility including in patient care areas. The judge noted that the term "union busting:" was a "sensitive, highly derogatory term which could easily inflame the emotions of people who view it." The decision noted that the sticker's language was so offensive that its prohibition "is a legitimate exception to the parties' past practice."

USC University Hospital is distinguishable. Significantly, the decision noted that the employer had never allowed its employees to wear insignia bearing such an inflammatory message. Here, in contrast, the evidence established that the Respondent had not prohibited the wearing of a virtually identical sticker, "Hands Off Our Benefits" which had been worn in patient care areas only one or two years earlier. In addition, the two stickers at issue here are not so "sensitive or highly derogatory" which would be expected to inflame the emotions of people who viewed them.

The Respondent argues that the insignia that have been permitted to be worn in patient care areas, including pins and ribbons, do not involve patients in a dispute, and that they are benign because they signify no conflict between labor and management. However, that is not the standard. The fact is that other insignia have been worn in patient care areas and the ban at issue here is an impermissible selective ban of certain union insignia.

The Respondent also contends that the newspaper article in which Union official Tucker spoke about the Respondent's attempt to "break the union" draws the small rural community into the dispute between the parties. That statement, according to the Employer, timed with the distribution of the stickers three weeks later on negotiation days, showed that the purpose of the stickers was to involve patients in the dispute. Therefore, says the Hospital, it was entitled to ban the stickers as being disruptive of the hospital's operations.

I cannot agree. The article merely presented Tucker's view of the dispute in the exercise of her free speech right. There is no evidence that patients or their families were disturbed by the article.

I therefore find that the Respondent has not presented evidence sufficient to show that special circumstances justified the ban on the "Hands Off Our Health Insurance" or the "I Support EJ Noble Workers" stickers in patient care areas. Accordingly, I find that the General Counsel's evidence has overcome the presumption of the validity of banning the stickers in patient care areas.

Regarding non-patient care areas of the Hospital, restrictions on the wearing of insignia are presumptively invalid. *St. John's Health Center,* above. As set forth above, the "Hands Off Our Health Insurance" stickers were worn by employees beginning on September 24, 2012. Employees were instructed to remove those stickers in non-patient care areas on the following occasions:

1. September 24: I credit the testimony of employee Clark that supervisors Gratto and Pomainville instructed her to remove that sticker in a non-patient care area. I cannot credit Gratto. He testified that he spoke to employees at the September 25 meeting about the EJ Noble sticker. However, that sticker had not been issued until three weeks later, on October 14, according to Carla Snell's October 15 email. Further, Snell testified that her September 25 email related only to the "Hands Off" sticker. I further credit Clark because Pomainville did not testify.

2. September 25: I similarly credit Clark's testimony that during the "huddle" meeting Gratto told the assembled workers that they could not wear the stickers in patient care areas,

explaining that he considered every area of the hospital to be a patient care area. Gratto conceded that he told employees Clark and Vincent to remove the "EJ Noble" sticker at a huddle meeting in the service hallway, a non-patient care area.

3. January 17: Peter Snell advised unit employees in a memo that the two stickers "are not allowed to be worn at any time while you are working." The memo remained posted for about two weeks when it was amended to remove that statement.

Clearly, the actions of the Respondent's supervisors in broadly prohibiting the wearing of union stickers in any areas of the hospital, which of course included non-patient areas, is unlawful. "This wide and unspecified geographic area is an overly broad prohibition on Section 7 activity... Respondent's prohibition of the … button in areas other than those devoted to patient care obviously runs afoul of *Beth Israel Hospital*, above, and its progeny, unless respondent's prohibition was 'necessary to avoid disruption of health care operations or disturbance of patients' or unless the button is not protected by Section 7 of the Act." *Sacred Heart Medical Center*, above, at 149.

As set forth above, I find that the Respondent has not established that the prohibition against wearing the two stickers at issue was necessary to avoid disruption of health care operations or disturbance of patients. Nor has it shown that the stickers were not protected by Section 7 of the Act.

I accordingly find and conclude, as alleged in the complaint, that since about September, 2013, the Respondent has unlawfully maintained a rule prohibiting employees from wearing certain union insignia.

Conclusions of Law

1. The Respondent, Canton-Potsdam Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

2. The Union, 1199 SEIU United Healthcare Workers East, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining a rule prohibiting its employees from wearing, in patient care areas and in non-patient care areas union stickers which state "Hands Off Our Health Insurance" and "I Support EJ Noble Workers," the Respondent has violated Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue

the following recommended[9]

ORDER

The Respondent, Canton-Potsdam Hospital, Potsdam, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule prohibiting its employees from wearing, in patient care areas and in non-patient care areas union stickers which state “Hands Off Our Health Insurance” and “I Support EJ Noble Workers.”

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule prohibiting employees from wearing, in patient care areas and in non-patient care areas, union stickers which state “Hands Off Our Health Insurance” and “I Support EJ Noble Workers.”

(b) Within 14 days after service by the Region, post at its facility in Potsdam, New York, copies of the attached notice marked “Appendix.”[10] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 24, 2013.

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ‘‘Posted by Order of the National Labor Relations Board’’ shall read ‘‘Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.’’

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 1, 2014

_____
Steven Davis
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a rule prohibiting you from wearing, in patient care areas and in non-patient care areas union stickers which state “Hands Off Our Health Insurance” and “I Support EJ Noble Workers.”

WE WILL NOT prohibit you from wearing, in patient care areas and in non-patient care areas union stickers which state “Hands Off Our Health Insurance” and “I Support EJ Noble Workers.”

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the rule prohibiting you from wearing, in patient care areas and in non-patient care areas union stickers which state “Hands Off Our Health Insurance” and “I Support EJ Noble Workers.”

CANTON-POTSDAM HOSPITAL
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlrb.gov.

130 S. Elmwood Avenue, Suite 630, Buffalo, New York 14202
716-551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge’s decision can be found at www.nlrb.gov/case/03-CA-114181 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.